

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7407

United States Court of Appeals
FOR THE SECOND CIRCUIT

—
GREEFF FABRICS, INC.,

Plaintiff-Appellant,

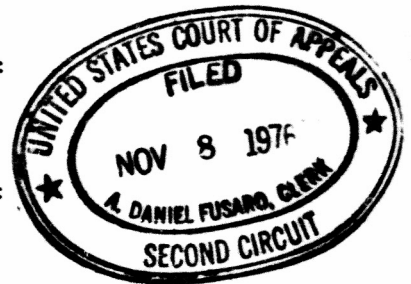
—v.—

MALDEN MILLS INDUSTRIES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT



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TABLE OF CONTENTS

Table of Cases, Statutes and Other Authorities Cited	iv
Statement of the Issues	1
Statement of the Case	2
Facts of the Case	4
Point I Plaintiff Has Taken All Necessary And Prudent Steps To Establish And Protect Its Copyright. . . . .	.13
Stipulation of the Parties . . . . .	.13
The License To Belle Fabrics, Inc. Was Granted To Enable Belle To Fulfill Its Commitments . . . . .	.13
Plaintiff's Copyright Notice Re- quirements Imposed on Its Licensee. . . . .	.14
The Requirements of Plaintiff's Attorneys and the Understanding of Belle's Attorneys Concerning Pro- tection of Plaintiff's Copyright . . . . .	.14
Belle's Understanding of and Com- pliance With the Copyright Marking Requirements of the Greeff-Belle License Agreement . . . . .	.18
Point II By Every Test Belle's Copyright Notice Is An Adequate Notice Of Copyright. . . . .	.20
Belle's Copyright Notice is Affixed to Each Copy (Repeat) of the Copy- righted Design. . . . .	.22
Point III Belle's Piece Ticket Method of Copyright Notice Affixation is Valid. . . . .	.25
Point IV The Express Provision In The Greeff-Belle License Agreement For Application Of A Copyright Notice To The Licensed Fabric Precludes A Finding Of Forfeiture. . . . .	.30

Point V	There Is A Direct Conflict Between The District Court's Decision In This Case And The Judscott Decision Which Should Be Resolved By This Court.	32
Point VI	The Trial Court Erred In Finding That Plaintiff Was Aware Of Belle's Method Of Affixation Of Its Copyright Notice.	36
	Plaintiff Did Not Switch Horses In Midstream	36
	The Trial Court's Erroneous Inference from "that Fact that the Rubber Stamp Could Not be Used to Print the Notice Directly on the Fabric.	40
	The Trial Court's Erroneous Inference From "The Availability Of At Least Two Relatively Simple and Inexpensive Methods of Permanently Affixing the Notice Directly to the Fabric at Every Repeat, Had This Been Greeff's Intention"	42
Point VII	The District Court Erred In Finding That Plaintiff Authorized Belle's Use Of A Single Copyright Notice Per Multi-Repeat Bolt Of Licensed Fabric. . .	43
Point VIII	Belle's Copyright Notice Should Be Evaluated In Light Of The New Copyright Law.	45
	Copyright Notice Provisions of the New Copyright Law.	47
	Forfeiture Under the New Copyright Law.	53
	Section 405(a)(1) of new Copyright Law.	55
	Section 405(a)(2) of new Copyright Law.	56
	Section 405(a)(3) of new Copyright Law.	57
	Section 405(b) of new Copyright Law.	59
Point IX	Plaintiff Established A Prima Facie Case Under Section 43(a) Of The Lanham Act And The District Court Erred In Dismissing It For Lack Of Evidence Of Injury.	61
	Statute Supporting Plaintiff's Claim	61
	Statement of Plaintiff's Claim	61

Stipulation As to Plaintiff's Rights.	62
Stipulation As to Defendant's Conduct	62
Admission Concerning Defendant's Use of Strike-off Sample	62
Defendant's Sample in Evidence.	63
Plaintiff's Case Under Section 43(a) and the Court's Ruling Thereon.	63
The Court's Decision.	65
The Trial Court Erred in Requiring Proof of Damage Resulting from Defendant's False Copyright Notice Per Se.	66
Point X The Trial Court Erred In Failing To Find That Defendant's Use Of A False Copyright Notice On Its Infringing Copy of Plaintiff's Copyrighted Design Is A Per Se Violation Of Section 43a Of The Lanham Act.	68
Conclusion	70
Addendum: Lewkowitz Affidavit of May 5, 1976.	
Addendum: Portion of Plaintiff's Exhibit 4.	

Index of Cases, Statutes
and other Authorities Cited

<u>American Press Ass'n v. Daily Story Pub.,</u> 120 F. 766 (7 Cir. 1902)	31
<u>Ames Publishing Co. v. Walker-Davis Publications,</u> 372 F.S. 1 (D.C. Pa. 1974)	67
<u>Channel Master Corp. v. JFD Electronics Corps.,</u> 260 F.S. 568 (E.D.N.Y. 1967)	69
<u>County of Ventura v. Blackburn,</u> 362 F.2d 515 (9 Cir. 1966)	31
<u>Dejonge Company v. Breuker & Kessler Co.,</u> 235 U.S. 33 (1914)	30
<u>Gilliam v. American Broadcasting Companies,</u> -F.2d-, Docket Nos. 75-7693, 76-7023 (2 Cir. June 30, 1976)	69
<u>Goodis v. United Artists Television,</u> 425 F.2d 397 (2 Cir. 1970)	20, 45, 46, 50, 52
<u>Greeff Fabrics, Inc. v. Belle Fabrics, Inc.,</u> Docket No. 75-1774	4, 7, 9
<u>Judscott Handprints v. Washington Wall Paper Co.,</u> 377 F.S. 1372 (E.D.N.Y. 1974)	4, 31, 32, 33, 34, 35, 58, 59
<u>H.M. Kolbe Co. v. Armigus Textile Co.,</u> 315 F.2d 70 (2 Cir. 1963)	4, 22, 23, 35, 37, 38, 51, 52
<u>Kuddle Toy v. Pussycat Toy Co.,</u> 183 U.S. P.Q. 642 (E.D.N.Y. 1974)	69
<u>Mishawaka Rubber & Wollen Mfg. Co. v.</u> <u>S.S. Kresge Co.</u> 316 U.S. 203, 62 S. Ct. 1022 (1942)	67
<u>National Comics Publications v. Fawcett</u> <u>Publications,</u> 191 F.2d 594 (2 Cir. 1951)	31

Scarves By Vera v. United Merchants and
Manufacturers, 173 F.S. 625 (D.C.S.D.N.Y. 1959). . 23, 24

Societe Comptoir De L'Industrie, etc.
Alexander's Department Store, 299 F. 2d
33 (2 Cir. 1962) 67

West Publishing Company v. Edward Thompson
Company, 176 F. 833 (2 Cir. 1910) 24

Section 43(a) Lanham Act
(15 U.S.C. §1125(a)) 1, 2, 5, 61, 65, 68, 69

Copyright Law of 1909:

Section 8 (17 U.S.C. §8) 68
Section 10 (17 U.S.C. §10) 22, 23, 25, 47, 48
Section 20 (17 U.S.C. §20) 48, 49, 50, 51
Section 21 (17 U.S.C. §21) 54
Section 105 (17 U.S.C. §105) 68

Copyright Law of 1976, Public Law 94-553:

Section 401(a) 47
Section 401(c) 47, 48
Section 402(c) 49, 50
Section 405(a) 53, 55, 56, 57
Section 405(b) 53, 54, 59, 60
Sections 102, 108, 112 of Transitional
and Supplemental Provisions 46

Copyright Revision Bill:

Title I 50
Title II 50
Title II, Section 206(b) 51, 52, 53

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GREEFF FABRICS, INC., :

Plaintiff-Appellant, :

-against- :

Docket No. 76-7407

MALDEN MILLS INDUSTRIES, INC., :

Defendant-Appellee. :

-----X

B R I E F O F P L A I N T I F F - A P P E L L A N T

STATEMENT OF THE ISSUES

1. Is the use of a single copyright notice on a bolt of fabric having a repetitive fabric design sufficient where the bolt is the smallest commercial unit sold, the fabric is never sold at retail or by the yard, and the recipient of the bolt uses the fabric and does not resell it?

2. Where, in settlement of prior litigation a copyright owner grants a limited license to permit the former infringer to fulfill commitments to its customers and requires in the limited license that a proper and statutory copyright notice be applied to the goods, is the copyright owner chargeable, is the copyright forfeit and is another infringer discharged from liability, if the limited licensee's copyright notice, applied in good faith, is deemed by a court to be statutorily insufficient?

3. Does a copyright notice in the name of the admitted infringer, when applied to the infringing goods and sold in competition with the original copyrighted goods having the copyright proprietor properly identified thereon, constitute a false description (of originality) and a false designation of origin (of the copyright design) in violation of Section 43(a) of the Lanham Act?

STATEMENT OF THE CASE

This is an appeal from the decision of the United States District Court for the Southern District of New York, Cannella, U.S.D.J., dismissing after trial both causes of action of the amended complaint. The Court's decision appears in the Joint Appendix (App. 432a).

The first cause of action is for copyright infringement and involves Plaintiff-Appellant's fabric design entitled "Contemplation" and the copyright thereof, Registration No. Gp 93648 (App. 378a). Except for the defense of forfeiture, there is stipulated agreement as to all facets of copyright validity and Defendant-Appellee's infringement thereof (App. 28a, 80a).

The second cause of action is for violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a). Defendant-Appellee is charged with having placed its own claim of copyright in the form of a statutory copyright notice in its own name, upon its copies of Plaintiff-Appellant's copyrighted fabric design used as samples for solicitation of orders, such claim of copyright and copyright notice constituting a false designation of origin and a false description as prohibited by Section 43(a).

The original complaint, containing the copyright infringement claim, was filed March 11, 1976, and a hearing

on Plaintiff-Appellant's motion for a preliminary injunction was held on March 19, 1976. The amended complaint (App. 4a), filed March 31, 1976, added the Lanham Act claim to the copyright infringement claim. The motion for a preliminary injunction was denied by Judge Cannella on April 13, 1976 (App. 53a) and Plaintiff-Appellant's motion to reargue or to renew the motion for a preliminary injunction was denied by him on May 10, 1976, in an order (App. 69a) directing the parties to prepare for trial expeditiously. While a notice of appeal was filed from the denials of the motions for the preliminary injunction, that appeal was withdrawn on stipulation without costs and without prejudice. The case was tried without a jury on July 13 and 14, 1976 (the full transcript appears at App. 77a-377a), the complaint was dismissed in an opinion dated August 11, 1976 (App. 437a), and this appeal followed from that decision and from the judgment entered thereon (App. 440a). Defendant-Appellee's motion to dismiss the appeal on procedural grounds was argued before this Court on October 25, 1976, and was summarily denied from the bench.

FACTS OF THE CASE

As in H.M. Kolbe Co. v. Armigus Textile Co., 315 F.2d 70 (2 Cir. 1963) and in Judscott Handprints v. Washington Wall Paper Co., 377 F.S. 1372 (D.C. E.D. N.Y. 1974) there is an interplay in this case between two parallel copyright infringement litigations involving the same copyright, and the outcome here has been decided by the Court below, and probably will be decided by this Court, on the effect of the earlier litigation (Greeff Fabrics, Inc. v. Belle Fabrics, Inc., United States District Court for the District of New Jersey, Docket No. 75-1774) upon the later litigation, the case at bar. For the purpose of clarity, we shall first set forth certain facts which apply equally to both cases, and certain facts which are stipulated in the present case, and we shall then set forth in parallel columns, in chronological order, those facts in the two cases which are pertinent to the issues on appeal.

The copyright involved in both cases is plaintiff's copyright on its Contemplation Fabric Design, Reg. No. Gp93648, registered September 13, 1974, on a publication date of August 15, 1974 (Plaintiff's Exhibit 1 herein, App. 378a). This is a current, successful design in plaintiff's line and it is sold to manufacturers of upholstered furniture, among others (App. 98a, 99a, 327a).

At the trial of the case at bar, defendant stipulated (App. 80a) that as of October 20, 1976, plaintiff, Greeff Fabrics was the proprietor of a valid subsisting copyright. Such copyright is the subject of this lawsuit. And subject to the claim and finding of forfeiture, infringement has been in effect conceded and found (App. 25(a), 29(a)). The infringement relates to the first cause of action. The second cause of action brought under Section 43(a) of the Lanham Act (15 U.S.C. 1125(a)) for a false copyright claim made by defendant with respect to its infringing copy of plaintiff's copyrighted design. What defendant did was to apply its own copyright notice to the strike-off samples of its infringing fabric and to use those samples to solicit business (App. 13a).

Showing a course of conduct of both design piracy and false copyright use are (a) the evidence in the record that defendant copied two other designs of plaintiff's license Belle (Plaintiff is not involved with these designs) and (b) the stipulation in the record that defendant applied its copyright notice to all 175 designs in its upholstery fabric line, including the copyrighted design in suit and the two additional Belle designs, without claiming copyright in any of these 175 designs, except as such claim is made by the copyright notice (App. 83a, 156a).

Defendant's counsel did state that immediately following the hearing on March 19, 1976, defendant "took steps to see that that copyright symbol was removed from all strike-offs". But there is nothing in the record showing that anything was done by Defendant in fulfillment of that statement.

With the foregoing as a general statement of the case, the following chronology will set forth the specific facts which are pertinent to the issues on the appeal:

After August 15, 1974: At a time not known to plaintiff, Belle commenced to sell an infringing copy of Plaintiff's copyrighted Contemplation design to manufacturers of upholstered furniture (App. 404a).

Before July, 1975: According to Plaintiff-Appellant's witness Fogel, a former salesman for Defendant-Appellee (employment terminated July 1, 1975), he obtained for Defendant, from a manufacturer of upholstered furniture, a one-yard sample of Belle's infringing fabric (App. 321a-325a). This is the very sample that Defendant

sent to its screenmaker for making the printing screens for printing Defendant's infringing fabric in suit, Plaintiff's Exhibit 4 (App. 257a).

October 20, 1975: Greeff v. Belle settled on basis of a limited license agreement, dated October 20, 1975 (Defendant's Exhibit C App. 387a), and a consent judgment (Defendant's Exhibit A, App. 381a). The license was reluctantly granted to enable Belle to fulfill its commitments to its customers (App. 123a); otherwise Belle would have been hurt financially (App. 128a-129a). The license was granted on Belle's urgent request (App. 128a-129a; 177a; 247a-249a).

October 20, 1975: According to Defendant's answers to Plaintiff's interrogatories at the time of the March 19, 1976 hearing, Defendant "had only a general idea of when it first obtained a sample of the Belle Fabric. * * * [Defendant] now believes that it first obtained the Belle fabric on or about October 20, 1975" (App. 19a).

This first Belle sample bore no copyright notice (App. 257a). On the issue of whether this sample was authorized by Plaintiff under the license agreement of October 20, 1975, Defendant does not know when the sample was made, imported, sold or shipped by Belle (App. 299a).

Before October 21, 1975: According to Defendant's witness Glasser, testifying at the March 19, 1976 hearing on plaintiff's motion for a preliminary injunction, Defendant obtained a second (10-yard) sample of Belle's fabric (Defendant's Exhibit E) before the first sample was sent to the screenmaker on October 21, 1975 (App. 19a, 257a), the second sample must have been obtained by Defendant before October 21, 1975.

However, according to the same witness Glasser testifying at the trial, Defendant obtained the second Belle sample after the first sample was sent to the screenmaker (App. 261a). According to his trial testimony, Defendant obtained the second Belle sample "about November 10, 1975" (App. 262a).

This second Belle sample bore no copyright notice (App. 263a). On the issue of whether this sample was authorized by Plaintiff under the license agreement of October 20, 1975, Defendant does not know when Belle made, imported, shipped or sold this sample (App. 300a).

After October 20, 1975: Plaintiff's attorneys provided Belle with a rubber stamp to be used in applying Plaintiff's copyright notice to Belle's licensed fabric (App. 177a-178a). Belle did not ship any licensed fabric until it received the rubber stamp (App. 181a). A print of the rubber stamp (in actual size, taken from App. 423a) follows:

The rubber stamp could not be applied directly to the fabric (App. 178a), but at the time Belle was given the rubber stamp Belle did not know this. It learned that the rubber stamp could not be applied to the fabric after trying it out with various inks (App. 199a).

Belle did not advise Plaintiff of this; it does not recall whether it advised Plaintiff's attorneys (App. 199a). After unsuccessfully trying to apply the rubber stamp directly to the fabric, Belle applied it to piece tickets attached to the fabric (App. 199a). Belle doesn't remember whether it told Plaintiff's attorneys exactly what it was doing; Belle told them it was "applying the copyright notice" (App. 184a, 199a).

October 21, 1975: Defendant sent the first Belle sample to its screenmaker for making printing screens for printing the infringing fabric (Plaintiff's Exhibit 4) in this case (App. 257a).

October 28, 1975: Consent Judgment (Defendant's Exhibit A, App. 381a), signed by District Judge Lacey, entered in Greeff v. Belle.

January 15, 1976: Defendant began selling its infringing goods (App. 318a-319a) and is continuing to do so (App. 319a). Defendant sells to manufacturers of upholstered furniture (App. 361a).

January 21, 1976: Plaintiff declined Belle's request for an extension of the license agreement (Plaintiff's Exhibit 12, App. 380a). However, Belle persisted in its efforts to obtain such extension, explaining to Plaintiff its "urgent need of additional time to protect customers" (App. 408a).

March 11, 1976: The present action was instituted.

After March 11, 1976: After the action was instituted, Defendant obtained a third (five-yard) sample of Belle fabric (Defendant's Exhibit F), this sample bearing a piece ticket with a copyright notice stamped thereon (App. 272a-273a). This was Defendant's first encounter with Plaintiff's copyright claim in Belle's design (App. 271a).

March 19, 1976: At the hearing on Plaintiff's motion for a preliminary injunction, Defendant asserted that all three Belle samples (the first two with no copyright notice, the third with only one copyright notice on a piece ticket) were "made under license by plaintiff" and that this "worked a forfeiture of plaintiff's copyright in its design" (App. 26a-27a).

March 25, 1976: In response to Defendant's contention that a single copyright notice per bolt of Belle's licensed goods was insufficient, Plaintiff's attorneys registered the copyright in a roll of wallpaper bearing a single copyright notice and introduced the resulting certificate of copyright registration as an exhibit in support

of the motion for an injunction (App. 47a-52a).

April 13, 1976: The Court below denied the motion, holding that a single copyright notice on a bolt of Belle's licensed fabric was insufficient (App. 60a); that the wallpaper registration was inapplicable to the present case (App. 66a-67a); that Plaintiff "seems to have been aware of Belle's method of affixing the copyright notice to the infringing fabric, since its own attorney supplied the rubber stamp to be used for this purpose" (App. 63a); and that "These facts strongly indicate that Greeff did authorize Belle's inadequately noticed publications" (App. 63a).

After April 13, 1976: Plaintiff immediately informed Belle of the decision in the case at bar (App. 395a) and advised Belle that a new method of affixing the copyright notice would have to be devised (App. 200a). Plaintiff's attorneys supplied Belle with a second -large- rubber stamp for affixing the copyright notice to the back of the pattern (App. 401a). A print (actual size) of the copyright notice made by this rubber stamp follows (App. 401a):

FABRIC DESIGN COPYRIGHT			
© BY GREEFF FABRICS, INC.			
NOT A GREEFF PRODUCT.			

April 23, 1976: Plaintiff granted Belle a three-months' extension of the license agreement (Defendant's Exhibit D, App. 390a, 408a, 426a). Inserted into the extension agreement was the following provision (App. 390a):

"This notice shall be applied to each repeat of the pattern."

After April 23, 1976: Belle found that it was unable to apply the copyright notice to the fabric by means of the large rubber stamp which plaintiff's attorney had supplied, and Belle so notified the trial Court by affidavit (Supplemental Appendix annexed hereto, page Included in the affidavit was the following representation: "No matter how we tried, we could not stamp the notice on the goods in legible form."

Ultimately, Belle found a new way of applying the copyright notice to the goods, namely, by means of adhesive labels attached adhesively to the goods, and, in the case of goods processed by "Scotch Guarding", the labels were also secured to the goods by staples (Plaintiff's Exhibit 11, App. 201a, 203a-204a).

POINT I

PLAINTIFF HAS TAKEN ALL NECESSARY AND PRUDENT
STEPS TO ESTABLISH AND PROTECT ITS COPYRIGHT

Stipulation of the Parties

As set forth in the foregoing Statement of Facts the parties have stipulated that plaintiff's copyright in suit is "a valid and subsisting copyright", that the stipulation applied to "all features of authorship, originality and title in the plaintiff."

The License To Belle Fabrics, Inc.
Was Granted To Enable Belle To
Fulfill Its Commitments

As set forth in the foregoing Statement of Facts plaintiff granted its license to Belle reluctantly, in settlement of its infringement action against Belle, and to enable Belle to meet its commitments to its customers. As stated by plaintiff's president Richard C. Johann (App. 123a, 125a):

A. [Mr. Johann] I reluctantly, and I mean reluctantly, agreed to let them fulfil the commitments that they had made prior to us dropping the lawsuit.

* * *

My concern at that time wasn't to penalize these people, and there was evidence brought forth to me that if we didn't allow them to have the license their business would be put in serious jeopardy, and we didn't want to do that.

Plaintiff's Copyright Notice Requirements
Imposed on Its Licensee.

The License Agreement contains the following provisions:
(Defendant's Exhibit C, App. 388a, 389a)

"4. Belle agrees to place the following copyright notice on all of the "CAMELOT" fabric or reproductions thereof sold or displayed in any form:

"Fabric design licensed and copyright
© by Greeff Fabrics, Inc."

" * * * Belle covenants and agrees to sell the fabric licensed hereby in strict conformity with all laws, rules and regulations."

The Requirements of Plaintiff's Attorneys and
the Understanding of Belle's Attorneys Concern-
ing Protection of Plaintiff's Copyright

Negotiations to settle the Greeff v. Belle infringement action and to arrange the Greeff-Belle license were conducted exclusively by and between the attorneys for the respective parties (App. 171a).

Belle's attorney Norman N. Popper testified as follows regarding the concern of plaintiff's attorneys for the protection of plaintiff's copyright (App. 236a):

Q Very good, sir. Will you be good enough to give your recollection in that regard?

A It was a constant, recurring theme [theme] that Greeff, the plaintiff, desired to protect its copyright, which they seemed to believe was a very valuable one, and this discussion was brought up

over and over again, and [if] he didn't grant licenses, and I was importuning for a license for my client. But this came up over and over again. Greeff is intimately desirous of protecting its copyright, and --

The following testimony by Mr. Popper gives his understanding of the copyright marking requirements of the plaintiff (App. 230a, 232a, 237a):

Q [Mr. Goldberg] Now, Mr. Popper did the license agreement provide for Belle to apply a copyright notice to the fabric it would sell under the license?

A [Mr. Popper] It did.

* * *

Q We are talking about the meeting with the attorneys for Greeff, Stoll & Stoll. Were you given instructions at that meeting by them or anyone else with respect to asking Belle to place the notice on every repeat of the design?

A The discussions took the form of requiring the copyright notice to be on the fabric or reproductions of the copyright design in the fabric, and that language having been discussed, was specifically embodied in Clause 4 of the agreement.

* * *

Q It is your understanding of Paragraph 4 of the license agreement that the language regarding copyright notice is intended to refer to the statutory copyright notice required by the copyright act?

A Insofar as I understand your question, the language of Paragraph 4 was intended to place an obligation upon the licensee to apply a statutory copyright notice.

Regarding the question of plaintiff's alleged authorization of a single copyright notice per bolt of fabric, Mr. Popper testified as follows (App. 239a-245a):

MR. ROBERT STOLL: * * * In the negotiations on October 20th, which led up to the agreement of October 20th, the license agreement, was there any approval on the part of Greeff or Greeff's attorneys to the use by Belle of a single copyright notice for a full bolt of fabric?

A [Mr. Popper] The question of a single copyright notice wasn't discussed in those specific terms and there was no specific approval, since it wasn't discussed.

Q Did Greeff or its attorneys specifically approve the use of a copyright notice on a hang tag or piece ticket or tag -- and I don't mean to confuse those terms, but I am using them collectively now -- at the negotiations which led up to this agreement?

A No. The agreement specifically says that there is a certain form of copyright notice, and that copyright notice is to be applied to the fabric. It doesn't say to a tag but to the fabric, or reproduction of the copyrighted design.

THE COURT:

* * * you stressed and underlined by intonation that it should be on the fabric in contradistinction to the hang tag or the tag which was clipped or stapled to the material.

THE WITNESS: Yes, sir.

* * *

Q [MR. ROBERT STOLL] Was it not your understanding Mr. Popper, at the October 20th meeting, that the copyright notice was to be applied to the selvage or the back of the fabric?

* * *

THE COURT: * * * Was it your understanding of what you were supposed to do?

THE WITNESS: Your Honor, it was my understanding that a rubber stamp would be supplied to my client and he would use that rubber stamp to imprint the copyright notice on the fabric, and that is the --

THE COURT: No, [Now] we are getting back to exactly what I was saying before. You didn't contemplate this sticker on here, did you?

THE WITNESS: No.

THE COURT: You thought it could be done right on the fabric, whereas, as he explained it, ink wouldn't come off or something, and that he had trouble finding out what to do?

THE WITNESS: I didn't know the back of the fabric would be coal black and that the rubber stamping wouldn't be visible.

* * *

Q [MR. GOLDBERG] Mr. Popper, you said a few moments ago that you understood the license agreement -- you stated if I got your testimony correct, that you believed that Belle had to comply with statutory requirements for copyright notices; is that correct?

A I used the language of the paragraph which says, and I quote "In strict conformity with all laws, rules and regulations."

* * *

Q Does it say anything in that sentence about a copyright notice?

A Well, if it is a copyrighted fabric, it is the obligation of the vendor to apply a copyright notice. Otherwise he forfeits his copyright.

Q And did you understand, then, that it was Belle's obligation to comply with the statutory copyright notice requirements under the license?

A Yes. I believe I understood that.

Q Did you advise your client, Belle, what those statutory requirements were?

A No. I didn't. I advised him what the agreement provided.

Q And you told him to live up to the agreement?

A Yes * * *

Belle's Understanding of and
Compliance With the Copyright
Marking Requirements of the
Greeff-Belle License Agreement

There is no question but that Belle's intentions were entirely honorable (App. 193a):

Q [MR. GOLDBERG] Mr. Lewkowicz, have you done everything within your power to help Greeff maintain its copyright in this matter?

A [Mr. LEWKOWICZ] I did what I was supposed to do.

Q What you were told to do?

A What I was told to do. What I was supposed to do. What I thought I was supposed to do.

Belle applied a copyright notice to every bolt of licensed fabric that left its premises after the date of the Greeff-Belle license agreement (App. 180a):

BY MR. GOLDBERG:

Q And as far as you know, every bolt of fabric which left your premises after that date did have such a notice on them, is that correct?

A Yes.

* * *

Q In other words, you waited until the Greeff's attorneys gave you the stamp?

A Right.

Q And then you took the stamp and put it on any bolt of material that you had in stock and any goods you got in?

A That is right. I am saying I don't remember if I had any goods in stock at that time.

Belle tried to apply the rubber stamp to the fabric but found that this could not be done; thereupon Belle applied it to piece tickets (App. 199a-204a).

Q [MR. ROBERT STOLL] At the time you were given the rubber stamp copyright notice, did you know whether or not it could be applied directly to your fabric?

A [MR. LEWKOWICZ] No. I didn't know.

Q When did you learn whether or not the rubber stamp copyright notice could be applied?

A We tried it out with various inks, and it didn't work.

* * *

Q What did you do, after trying, that you could not apply the copyright notice directly to the fabric?

A We put it on the tickets.

* * *

Q Do you recall advising Greeff or its attorneys of applying the rubber stamp copyright notice to tickets rather than directly to the fabric?

A I wouldn't remember.

Q I believe you testified that there did come a time that you were advised that the method you were using was not acceptable, and that you attempted to devise new means --

A That's right.

Q -- for applying the copyright notice.

A That's right.

* * *

Q Did you find it was simple or difficult to find an alternative method?

A No. Very difficult.

* * *

Q Mr. Lewkowicz, referring to Plaintiff's Exhibit 11 and the adhesive labels on there with the Greef copyright notice, I ask you whether these are adhesive labels which you found in the store or how did you locate these labels?

A I have located it after asking some dealers and packaging suppliers, and they found this for me, and they have them printed for me.

Q Is this the manner in which all Camelot fabric or the licensed fabric is sold and shipped by Belle?

A That's right.

POINT II

BY EVERY TEST BELLE'S COPYRIGHT NOTICE IS AN ADEQUATE NOTICE OF COPYRIGHT.

We must not lose sight of the fact, as stated by this Court in Goodis v. United Artists Television, supra, 425 F.2d 397, 403 (2 Cir. 1970) that:

" the principal purpose of the statutory notice provisions is to inform the public that copyright is claimed.⁸

* * *

"8. To avoid accidental forfeiture, courts have liberally construed what constitutes adequate notice. See e.g., Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960); National Comics Publications Inc. v. Fawcett Publications, Inc., 191 F.2d 594 (2d Cir. 1951)."

There is not a syllable of testimony in the record suggesting that Belle's copyright notice fails "to inform the public that copyright is claimed." On the contrary, defendant has stipulated that it would give notice (Transcript of Hearing on Motion for Preliminary Injunction, pp. 31-32):

MR. [ROBERT] STOLL: Could I also have a stipulation of counsel that the form of copyright notice as opposed to its placement or the number of times it is placed, the form of copyright notice is entirely adequate?

MR. GOLDBERG: Sure .

MR. STOLL: It is a correct form.

MR. GOLDBERG: If you want my legal opinion, yes.

MR. STOLL: I am asking for your stipulation.

MR. GOLDBERG: Yes, we are not arguing with the form of it. It would give somebody notice if it was placed anywhere where they could see it, yes.

There is nothing in the record to show that Belle's copyright notice was placed where it could not be seen. On the contrary, even as placed on the specimen of Belle fabric which defendant obtained after commencement of this action (Defendant's Exhibit F), the copyright notice was quickly found and seen by defendant (Transcript of Hearing on Motion for Preliminary Injunction, p. 21, App. 41a):

Q [MR. GOLDBERG] Mr. Glasser, did you examine this five yard piece marked Defendant's Exhibit B?

A [MR. GLASSER] The minute that it was received, since time was so short, it was run right out on our tables and we looked under very strong light both back and front and selvages to see if there was any marking of any copyright whatsoever. The only thing we did see was, there was the tag stapled to the edge of the piece, which we turned over, and there was a rubber stamp on the back which states, "Fabric design copyright by Greeff Fabrics Company, not a Greeff product."

Belle's Copyright Notice Is
Affixed to Each Copy (Repeat)
of the Copyrighted Design.

There is no question but that a single copyright notice on a multi-repeat bolt of fabric which is sold in short lengths to more than one customer (as in a dry goods store) is insufficient under Section 10. In such case, only one customer would receive notice of copyright; the rest would not. See H.M. Kolbe Co. v. Armigus Textile Company, 315 F2d 70, (2 Cir. 1963) where Judge Waterman wrote for this Court as follows (our emphasis):

"Textiles are normally sold by the bolt at wholesale, in units of a yard at retail. By repeating its notice of copyright every 16 inches down the length of its printed fabric, therefore, Kolbe affixed at least one statutory notice to each smallest commercial unit by which its product is normally sold. No other practicable arrangement of copyright notices would better have warned defendants below, or other potential infringers, of Kolbe's claim."

But here, Belle's licensed fabric is sold only by the bolt and only to end users of the fabric as fabric (manufacturers of upholstered furniture) and no customer has received a bolt of licensed fabric without a copyright notice affixed thereto (App 180a, 205a).

The question that remains is whether the single copyright notice which Belle attached to each bolt of licensed fabric was "affixed to each copy thereof" as required by Section 10. For the purposes of this discussion, we shall assume that "each copy" means "each repeat".

It was shown to the trial Court, on the motion for a preliminary injunction, that it is the practice of the Copyright Office to accept for deposit multi-repeat works of art bearing a single copyright notice where these works are the "smallest commercial unit" sold. This expression was taken from the above-quoted statement in the Kolbe case, 315 F.2d at P. 73, and it was embodied in a letter to the Register of Copyrights in connection with an application to register the copyright in a multi-repeat roll of wall covering (App. 47a-52a). The trial Court was not impressed with this showing (App. 58a, 66a).

Why a single copyright notice would be sufficient when applied to a multi-repeat roll of wall covering (which may be made of fabric) and not sufficient when applied to a multi-repeat roll of fabric, is not explained. It is common knowledge that the Copyright Office will accept a single copyright notice on many multi-repeat works of art which constitute the "smallest commercial unit" sold, e.g., a multi-repeat bedspread, tablecloth, window drape, neck scarf, blouse, etc., etc. See Scarves By Vera v. United Merchants and Manufacturers,

173 F.S. 625, 628 (D.C. S.D. N.Y. 1959). See Also West Publishing Company v. Edward Thompson Company, 176 F. 833, 834, 837 (2 Cir. 1910) where this Court approved a single copyright notice on an "aggregation of ... Weekly Reporters into "a single volume, although each Weekly Reporter had been previously published as a separate publication bearing its own individual copyright notice.

It should also be pointed out that Belle's piece ticket is not a casual "detachable tag" such as was disapproved in the Vera case, supra, 173 F.S. at p. 628. As the testimony of witnesses Drinkard and Fogel clearly shows (pages 28-31 of this Brief), a piece ticket is physically attached to a certain piece (bolt) of fabric emanating from a certain source, having certain specifications and a certain yardage, and bearing the customer's order number which, in turn, further identified the fabric with its particular customer and with all of the information that normally appears in a purchase order. A representation of the Belle piece ticket which is involved in this action is appended to the decision on appeal (App. 438a), and it will be noted that in addition to the above-mentioned items of information set forth herein, it specifies the "Piece No." of the particular piece to which it is attached. It is apparent that Belle's piece ticket is connected with a particular piece (bolt) of fabric and not to any other piece of

fabric, even one having precisely the same specifications.

Section 10 does not require a separate copyright notice for each copy or repeat of the copyrighted work; a single copyright notice will satisfy Section 10 if it, in fact, is affixed to each and every copy or repeat. It is enough, as here, and as in the case of a roll of wallpaper, that a copyright notice is attached to the smallest commercial unit sold, and it is thereby attached to each and every part and repeat thereof.

POINT III

BELLE'S PIECE TICKET METHOD OF COPYRIGHT NOTICE AFFIXATION IS VALID

Although plaintiff never authorized Belle to apply only one copyright notice per bolt of licensed fabric, whether by piece ticket or otherwise, plaintiff believes that Belle's method, in the special circumstances of Belle's business, is a perfectly proper, valid, statutory method of copyright affixation. Belle's business in the licensed fabric was described by Mr. Lewkowicz as follows (App. 205a):

Q [MR. ROBERT STOLL] Does Belle sell the fabric in anything less than full bolt rolls?

A [MR. LEWKOWICZ] No.

Q Or quantities?

A We sell only full rolls.

Q Do you sell the Camelot fabric to stores for resale or to users of the fabric?

A To manufacturers. Furniture manufacturers.

Belle's method of copyright notice affixation was by piece ticket attached to the bolt, one such ticket to each bolt, the copyright notice being stamped upon the piece ticket by means of a rubber stamp supplied by the plaintiff. A piece ticket is not a disposable hangtag; it is a permanent attachment to the bolt, both physically and functionally, remaining on the bolt as long as there is a bolt, that is, as long as the fabric which comprises the bolt or any part thereof remains in bolt form. The piece ticket relates to the bolt in its entirety and to each and every yard thereof. When a cut of fabric to which the piece ticket is attached is severed from the bolt, the piece ticket is reattached to the remaining fabric on the bolt, and the yardage figure on the ticket is changed to reflect the reduced yardage in the bolt.

The piece ticket has many established functions important to both the manufacturer (or converter) and the industrial user, as clearly appears from the following testimony of plaintiff's customer and witness, Daniel M. Drinkard, president of Stanton-Cooper Upholstery Company of High Point, North Carolina, familiar with the upholstered furniture manufacturing industry to which plaintiff's copyrighted goods, Belle's licensed goods, and defendant's infringing goods are sold (App. 138a):

A [MR. DRINKARD] The piece ticket is the manufacturer's identification that is on the roll of fabric. It historically has the manufacturer's name on it. It has the contents of the fabric. It has the yardage on the fabric. It will have many times the repeat of the fabric, the pattern name or number and the color identification.

It is used by my company and the company that I was previously responsible for as a means of identifying that particular fabric. The piece ticket is used in your receiving reports to verify the yardage that is indicated on the ticket against what your records show as the yardage you receive. In any company the piece ticket is kept with the fabric until the roll of fabric is used up. We use it to substantiate any claims that we have against the manufacturer as far as quality or number of yards shipped or the proper identification of the pattern itself.

This testimony was fully supported and amplified by plaintiff's witness, Myron A. Fogel, a former salesman employed by defendant's sales representatives, selling to the upholstered furniture manufacturers industry. Mr. Fogel's deposition testimony was read into the trial record as follows (App. 344a-349A, 351a-352a):

MR. ROBERT STOLL: * * *

"Q [MR. SAMUEL J. STOLL] Would you consider yourself to be knowledgeable on the use of piece tickets in the furniture [manufacturing] industry?

"A [MR. FOGEL] Yes, I think so.

"Q I hand you a sheet which bears the following notation, 'Exhibit B,' and attached to it is a yellow card. I ask you if you recognize what that yellow card is.

"A This is a piece ticket from Belle Fabrics. The pattern on it is Camelot, and it tells where the fabric was made, which is a very normal ticket.

* * *

"A The ticket would remain with the piece of goods, in most cases.

"Q Is there anything else done to the piece ticket after the small piece or cut is removed from the bolt?

"A There could be yardage, how many yards were cut from the bolt, to keep in inventory control.

"Q When is the piece ticket actually discarded?

"A I would say when the piece is used up.

* * *

"Q [MR. KINZLER] These piece tickets have a number of categories on it?

"A Yes.

"Q I take it when you see these piece tickets all of these categories would be filled out, or whatever is necessary?

"A Normally, yes. Normally they would fill in the color, the yardage of the piece, the piece number and the customer's order number.

"Q Where are those piece tickets affixed?

"A The end -- it's affixed to one end of the piece of yardage, or maybe some mills put it on tube, but usually the end of the piece, the end of the length of the piece.

* * *

"Q What happened [happens] to the piece cut [ticket] if, let's say, they cut ten yards off the piece?

"A Normally it would be left on the piece.

"Q On the piece?

"A The piece that is left, the remainder. If it is a fifty yard piece and they take off then [ten], we put it back on the piece to identify the piece.

* * *

"Q How is this piece ticket affixed to the fabric.

"A Well, that pin that you are holding in your hand right now is just -- well, let me show you. It is put on it like this (indicating).

"Q It is not a closed pin; it is just like a nail?

"A It locks onto the piece of goods until it is torn off, unless it is not put on properly.

* * *

"Q Let me [ask] you, when they cut this ten-yard piece which I referred to in a former question off a roll of, let's say, fifty to sixty yards of fabric, somebody goes by and takes this piece ticket off and tacks it on to what is remaining?

"A If somebody is cutting off this part of -- ten yards of a roll of goods, and the ticket is on the roll, they cut off ten yards, and the ticket would be on there. They would remove the ticket and put it back on the original piece, what is left of it, to identify that piece."

POINT IV

THE EXPRESS PROVISION IN THE GREEFF-BELLE LICENSE AGREEMENT FOR APPLICATION OF A COPYRIGHT NOTICE TO THE LICENSED FABRIC PRECLUDES A FINDING OF FORFEITURE.

As has above been stated, the license agreement of October 20, 1975, contained the following provision (App. 388a-389a):

"4. Belle agrees to place the following copyright notice on all of the 'CAMELOT' fabric or reproductions thereof sold or displayed in any form:

"Fabric design licensed and copyright © by Greeff Fabrics, Inc."

" * * * Belle covenants and agrees to sell the fabric licensed hereby in strict conformity with all laws, rules and regulations." (Our emphasis.)

This provision is virtually identical with the notice requirement prescribed by the Supreme Court in Dejonge Company v. Breuker & Kessler Co., 235 U.S. 33,36 (1914) as follows:

"Every reproduction of a copyrighted work must bear the statutory notice." (Our emphasis.)

"Every reproduction" means every repeat, and "all... reproductions" means all repeats, and what the above quoted license requirement obviously means is that Belle agreed and was required to place the copyright notice on all repeats of the licensed fabric, not just on some, but on all. In a roll or bolt of licensed fabric consisting of many repeats, it is not compliance with the agreement to apply the copyright notice to only the first or last repeat; compliance requires that the notice be applied to all repeats, that is, to each and all, not merely to a selected one. See National Comics Publications v. Fawcett Publications, 191 F. 2d 594, 601 (2 Cir. 1951) where Judge Learned Hand wrote:

" * * * if 'McClure' exacted a promise from the newspaper to affix the notice upon all copies which the newspaper published, performance of that promise became a condition upon the newspaper's license to publish; and publication without the 'required' notice was not 'by authority of the copyright proprietor' and did not 'forfeit' the copyright." (Emphasis supplied)

See also Judscott Handprints v. Washington Wall Paper Co., 377 F.S. 1372, 1375, 1377 (D.C.E.D. N.Y. 1974); American Press Ass'n. v. Daily Story Pub., 120 F. 766, 770 (7 Cir. 1902) appeal dismissed 193 U.S. 675; County of Ventura v. Blackburn, 362 F. 2d 515, 520 (9 Cir. 1966).

POINT V

THERE IS A DIRECT CONFLICT BETWEEN THE DISTRICT COURT'S DECISION IN THIS CASE AND THE JUDSCOTT DECISION WHICH SHOULD BE RESOLVED BY THIS COURT.

In Judscott, supra, 377 F.S. 1372, 1374, 1375, as here, the license agreement resulted from an amicable settlement of a copyright infringement controversy, permitting the former infringer to continue to sell the infringing fabric for a specified period. In Judscott, the license term was upwards of a year (November 15, 1972 to December 31, 1973). In the present case, the license agreement (Defendant's Exhibit C) provided for a license term of about six months (October 20, 1975, to May 1, 1976), which term was extended by a supplemental agreement (Defendant's Exhibit D) for an additional three months, terminating on August 1, 1976. In Judscott, as here, the license was issued to enable the infringer-licensee to "meet commercial commitments undertaken prior" to the settlement (377 F.S. at p. 1374). The license agreement in the present case expressly provided (paragraph 2) for "phasing-out" the licensed fabric and that "phasing-out will be completed on or before May 1, 1976." The extension agreement in the present case (Defendant's Exhibit D)

contains the following provisions:

"WHEREAS, Belle has advised Greeff that Belle has been unable to fill current orders for such fabric and that termination of said limited license on May 1, 1976, will cause undue hardship to Belle,

* * *

"1. Belle represents that it has scrupulously applied and will continue to scrupulously apply the following copyright notice to all CAMELOT fabric or reproductions thereof sold or displayed in any form:

Fabric Design Copyright

© by Greeff Fabrics, Inc.

Not a Greeff product.

SJS
JL.

This notice shall be applied to each repeat of the pattern.

"2. Greeff, in reliance upon the foregoing representation, hereby agrees to extend the term of said limited license for a period of three months, and said limited license will terminate August 1, 1976, upon the terms and conditions hereof and of said Agreement. There shall be no promotion or advertising after April 1, 1976, and sales and shipments will be limited to presently existing orders."

In the Judscott case, the District Court for the Eastern District of New York held, as above quoted (377 F.S. at p. 1378) that:

"An abandonment of a copyright requires some overt act by the copyright owner 'which manifests his purpose to surrender his rights in the "work," and to allow the public to copy it.' A licensing agreement containing an express provision of the type evidenced here can hardly be said to be such an act; 'to the contrary, it indicates a positive and continuing purpose to maintain one's rights.'

"Moreover, there is strong authority in this circuit which suggests that in the context of a licensing agreement evincing every intention to limit, insofar as practicable, the infringing sales, publication of improperly noticed copies will not frustrate the very object of the agreement—protection of the copyright."

In the present case, the District Court for the Southern District of New York held (App. 433a) that:

"Greeff's final claim is that because Belle's sales were allowed solely as part of an agreement in settlement of copyright litigation, they were unauthorized publications under the Kolbe and Judscott cases. However, the Court finds those cases inapplicable in that the scope of the instant licensing agreement extends far beyond the limited exception delineated therein."

Clearly, there is a direct conflict between the decision of the Court below and the decision in Judscott, and it is respectfully suggested that this conflict be resolved on the present appeal.

There is also a direct conflict between the decision in the present case and this Court's decision in

H.M. Kolbe Co. v. Armagus Textile Co., 315 F.2d 70 (2 Cir. 1963). In Kolbe, at p. 75, this Court held that the copyright owner's "acquiescence" in the continued sale of the infringing goods without a copyright notice

" * * * was clearly a part of a larger endeavor to limit infringing sales by Youthline and Bea Wright insofar as that could be accomplished by an out-of-court settlement with them.

"Under the circumstances of this case, therefore, we hold that appellants have failed to prove a forfeiture of Kolbe's copyright based upon Kolbe's acquiescence in sales of unmarked garments bearing the copyrighted design."

In the present case, there is no showing of any acquiescence by plaintiff in any sale of the licensed goods without a copyright notice. Nor is there any showing of acquiescence in the sale of the licensed goods with what has been held to be an insufficient copyright notice. But even if there were acquiescence in the sale of goods with an insufficient notice (which plaintiff categorically denies), there would still be a direct conflict between Kolbe and the decision in the present case which should be resolved on this appeal.

POINT VI

THE TRIAL COURT ERRED IN FINDING
THAT PLAINTIFF WAS AWARE OF BELLE'S
METHOD OF AFFIXATION OF ITS COPY-
RIGHT NOTICE.

Only one issue was decided by the trial Court in the decision on appeal, namely, whether plaintiff was aware of Belle's method of affixing the copyright notice to the licensed fabric. The Court decided this issue in the affirmative. The following is a detailed analysis of the specific grounds of the Court's decision.

Plaintiff Did Not Switch
Horses In Midstream

The trial Court held (App. 433a) that:

"After taking the position at the preliminary injunction stage of these proceedings that this notice was in complete conformity with statutory requirements (a position rejected by this Court's decision of April 13, 1976) as well as the licensing agreement, plaintiff switched horses in midstream and attempted to show at trial that prior to the institution of this action it possessed no knowledge whatsoever of Belle's method of affixing the copyright notice to the fabric."

To switch horses is to substitute one horse for another. Plaintiff never switched or substituted one position for another in this case and the trial Court's finding that it did is entirely erroneous.

On the motion for a preliminary injunction, plaintiff's position was that Belle's method of copyright affixation

was proper. In support of this position, plaintiff showed the trial Court that it is common practice for the Copyright Office to accept a single copyright notice on a multi-repeat roll of wallpaper where such roll is the smallest commercial unit sold. See page 24 of this Brief.

This was the primary issue. The question of whether plaintiff was aware of Belle's method of copyright notice was secondary. If the method was valid, awareness was a moot issue.

At the same time, plaintiff asserted the alternative position, under H.M. Kolbe v. Armigus Textile Co., 315 F. 2d 70, 75 (2 Cir. 1963), that even if Belle's method of copyright notice were deemed insufficient, this would not result in a forfeiture of the copyright since Belle's sales were in furtherance of a settlement agreement terminating an infringement action which plaintiff had previously brought against Belle.

Plaintiff also asserted a third position, namely, that "Plaintiff has imposed adequate copyright notice requirements on Belle to preserve the copyright." This was a reference to the license agreement of October 20, 1975 (Defendant's Exhibit C, Paragraph 4, App. 388a).

When the trial Court handed down its decision on the motion for a preliminary injunction, it became evident that the Court had rejected all three positions, holding (a) that

Belle's method of copyright notice was insufficient,

(b) that Kolbe was not applicable, and (c) that plaintiff:

".....seems to have been aware of Belle's method of affixing the copyright notice to the infringing fabric, since its own attorney supplied the rubber stamp to be used for this purpose. These facts strongly indicate that Greeff did authorize Belle's inadequately noticed publications."
(App. 63a).

To take issue with this finding (which plaintiff considered entirely unfounded) and to introduce new evidence, plaintiff moved to reargue or, in the alternative, to renew the motion for a preliminary injunction. In support of the renewed motion, plaintiff submitted an affidavit of plaintiff's president (Defendant's Exhibit B) and an affidavit of Belle's president (Defendant's Exhibit J) showing that Belle's allegedly insufficient copyright notice method was never brought to plaintiff's attention. In the latter affidavit (App. 396a), Belle's president made the following representations to the trial Court:

"It is true that the copyright notice and the rubber stamp were supplied to us by Greeff's attorneys, but it is not true that they (or Greeff itself) authorized our method of affixing the copyright notice to the goods. Indeed, it was not until we were informed of Malden's defense in this case that we described to Greeff's attorneys how we were affixing the copyright notice (by piece ticket attached to the goods) and why we were unable to apply the rubber stamp to the selvedge of our goods.

"2. The decision to apply the copyright notice to the tickets, and only one to a bolt, was entirely ours, and

it was definitely not directed or authorized or approved in any way by Greeff or Greeff's attorneys.

"We applied the copyright notice to these tickets because we thought this was entirely right and proper, and we knew of no other way of applying the copyright notice to the goods. We applied only one copyright notice to each bolt because we thought this was fully adequate under the particular circumstances of our business."

The motion to reargue or renew the motion for a preliminary injunction was denied and an appeal was promptly filed.* Among the "Issues Proposed To Be Raised on Appeal" was the following:

"Where plaintiff applies a copyright notice to the selvedge of its fabric at each repeat of the copyrighted pattern, and where both plaintiff and its licensee categorically deny that plaintiff authorized its licensee to apply only one copyright notice by any means to a multi-repeat bolt of the licensed fabric, and where defendant has introduced no evidence to show that licensee's use of a single copyright notice on a piece ticket was authorized by plaintiff, was it reversible error for the District Court to deny plaintiff's motion for a preliminary injunction on the ground that such copyright notice may have been authorized by plaintiff?" (Emphasis supplied)

Throughout these proceedings, the motion for a preliminary injunction, the motion to reargue or renew same, and the appeal from the denial of both motions, plaintiff remained steadfast in its contention that Belle's method of copyright notice was valid, and plaintiff continued to make that contention on this appeal. In view of this history of the proceedings, the trial Court clearly erred in finding (App. 433a) that "plaintiff switched horses in midstream."

* This appeal was withdrawn by stipulation when the trial Court ordered an early trial.

**The Trial Court's Erroneous
Inference from "the Fact that
the Rubber Stamp Could Not be
Used To Print the Notice Di-
rectly on the Fabric."**

From its finding that the rubber stamp which plaintiff's attorneys supplied to Belle "could not be used to print the notice directly on the fabric" (App. 434a), the trial Court inferred "that plaintiff was aware that notice of its copyright proprietorship did not appear on every repeat of the licensed fabric sold by Belle" (App. 434a). This is a patently erroneous conclusion since there is no showing that plaintiff's attorneys (or Belle) were aware the rubber stamp could not be used on the fabric. The Court overlooked the following undisputed testimony by Belle's president (App. 199a):

Q [MR. ROBERT STOLL] At the time you were given the rubber stamp copyright notice, did you know whether or not it could be applied directly to your fabric?

A [MR. LEWKOWICZ] No, I didn't know.

Q When did you learn whether or not the rubber stamp copyright notice could be applied?

A We tried it out with various inks, and it didn't work.

Q Did you advise Greeff or any of the representatives, such as attorneys, that you could not apply it on the fabric after trying it?

A I don't remember if I notified. Greeff, not, but if I did the attorneys, I don't remember.

The trial Court also overlooked the fact that plaintiff's attorneys supplied Belle with a second rubber stamp for applying the copyright notice, and that this was done after the decision on the motion for a preliminary injunction was handed down. This appears from the very same Lewkowicz affidavit (Defendant's Exhibit J, App. 395a) which the Court cited in its decision (App. 436a). As stated in that affidavit (App. 401a):

"Greeff's attorneys have supplied us with a large rubber stamp, thus,

FABRIC DESIGN COPYRIGHT
© BY GREEFF FABRICS, INC.
NOT A GREEFF PRODUCT.

and we have undertaken to devise a method of applying this stamp to the back of the goods, at each longitudinal "repeat" of the pattern, without damaging the goods."

As was the case with the first (small) rubber stamp, it developed that the second (large) rubber stamp could not be applied directly to the fabric. See the Lewkowicz affidavit of May 5, 1976 (hereto annexed).

Query: What should be inferred from the fact that the large rubber stamp could not be applied to the back of the fabric, that it was also intended to be applied to the piece ticket? This would be sheer nonsense, since the trial Court had already ruled that a piece ticket notice was insufficient. Clearly, neither inference is warranted.

The Trial Court's Erroneous Inference
From "The Availability Of At Least
Two Relatively Simple And Inexpensive
Methods Of Permanently Affixing The
Notice Directly To The Fabric At
Every Repeat, Had This Been Greeff's
Intention" (App. 434a)

This was a reference to the so-called "heat transfer" printing methods to which defendant's witness Glasser testified (App. 438a). The fallacy of the Court's inference is apparent from the total absence of any showing that either Belle or the plaintiff was aware of these methods. Indeed, there is an uncontroverted denial in the record of any such awareness by Belle, elicited by defendant's own attorney (App. 210a):

BY MR. GOLDBERG:

Q Mr. Lewkowicz, are you familiar with the process known as heat transfer paper?

A [Mr. Lewkowicz] No.

Q You aren't?

A No.

POINT VII

THE DISTRICT COURT ERRED IN FINDING
THAT PLAINTIFF AUTHORIZED BELLE'S
USE OF A SINGLE COPYRIGHT NOTICE PER
MULTI-REPEAT BOLT OF LICENSED FABRIC

At the trial, Belle's president was asked the following question (App. 204a):

Q [MR. ROBERT STOLL] Did anyone at Greeff or its attorneys ever advise you that a single copyright notice for an entire bolt of cloth is acceptable.

MR. GOLDBERG: Objection, your Honor. The witness has already testified at length about this. There's already an affidavit in evidence which Mr. Stoll prepared which says it was in accordance with the agreement. How can we have any more on the same issue?

The objection was sustained and defendant effectively excluded from the record testimony on the most crucial issue in the case from the only witness with personal knowledge of the facts. Defendant should not have been heard to say, and the District Court should not have allowed itself to find, that plaintiff or its attorneys authorized Belle's use of a single copyright notice.

Defendant should also be estopped, by the testimony of its own witness Norman Popper (Belle's attorney), from contending that plaintiff authorized Belle's use of a single copyright notice per bolt of licensed goods, and this testimony should also have precluded such finding by the trial

Court. As appears elsewhere in this Brief (page 16), Mr. Popper testified that the question of a single copyright notice was never discussed with and hence never approved by, plaintiff's attorneys (App. 239a).

Moreover, defendant put in evidence a certain affidavit signed by plaintiff's president Richard C. Johann (Defendant's Exhibit B), and that affidavit contains the following statement (App. 385a):

"Greeff has never authorized the use of a hang-tag or piece ticket copyright notice by Belle Fabrics, Inc. or a single notice per bolt. Greeff's authorization was for a correct legal notice such as Greeff itself uses, namely, a copyright notice applied to the selvedge at each repeat of the pattern."

Counsel for defendant was unhappy with the basis of Mr. Johann's knowledge (App. 118a):

Q [MR. GOLDBERG] The fact is that you have never had any knowledge of what Greeff authorized Belle to do or didn't authorize Belle to do, is that correct, sir?

A [Mr. JOHANN] No; it is not correct. It is peripheral knowledge.

Q Where did you get that peripheral knowledge?

A From counsel.

Defendant may characterize this testimony and Mr. Johann's affidavit as hearsay, but it was defendant who elicited the testimony and introduced the affidavit into evidence. There is nothing in the record which contradicts Mr. Johann's testimony or Mr. Johann's affidavit.

POINT VIII

**BELLE'S COPYRIGHT NOTICE SHOULD
BE EVALUATED IN LIGHT OF THE NEW
COPYRIGHT LAW**

In Goodis v. United Artists Television, 425 F. 2d 397, 402 (2 Cir. 1970), this Court referred to the then pending General Revision of the Copyright Law as follows:

"In considering the 1909 amendments and the liberalizing spirit in which they were enacted, we note that the proposed general revision of the copyright law, introduced in the 90th Congress and referred to the House and Senate Judiciary Committees,⁵ would make the result reached by the district court in the present case impossible."

* * *

"5. The proposed legislation to which we refer is thorough and complete. It is the product of a great deal of work by the Register of Copyrights, his staff, a panel of consultants drawn from the copyright bar, 22 days of hearings in 1965 (at which over 150 witnesses testified), and numerous executive sessions of a sub-committee of the House Committee on the Judiciary H.R. Rep No. 863, 90th Con., 1st Sess., at 203 (1967). The House Report just cited contains excellent descriptions of the proposed provisions coupled with accurate summaries of the existing law in areas where the new statute would work a change (See e.g., H.R. Rep. No. 83, supra, at 96-100, discussing the federal pre-emption section of the proposed act). As such, the Report constitutes a valuable reference tool to be used in cases arising under the present Copyright Act."

These remarks, made in 1970, are even more pertinent today, since the proposed legislation has now (on October 19, 1976) been enacted into law. It is true that by its terms (Secs. 102, 108 and 112 of the Transitional and Supplementary Provisions), the new Copyright Law becomes effective on January 1, 1978 (except as otherwise provided) and "All causes of action that arose under title 17 before January 1, 1978, shall be governed by title 17 as it existed when the cause of action arose."

However, under Goodis, supra, the new Copyright Law should constitute "a valuable reference tool to be used in cases arising under the present Copyright Act." As we shall shortly show (this Brief, pp. 50a-63a), we would now go further and respectfully suggest to the Court that where there is no conflict or inconsistency between the new Copyright law and the present Copyright Law, and where there are no opposing rights vested under the present Copyright Law, the present Copyright Law should be interpreted in accordance with the Congressional intent as expressed in the new Copyright Law in all pending cases arising under the present Copyright Law, including the present case on appeal. As will be shown, the present Copyright Law, considered in the light of the new Copyright Law "would make the result reached by the district court in the present case impossible."

(Goodis, supra, 425 F. 2d at p. 402).

Copyright Notice Provisions
of the New Copyright Law

The pertinent provisions of the new Copyright Law, to which we respectfully call the Court's attention, are Sections 401(a) and 401(c):

"(a) GENERAL REQUIREMENT.—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

* * * * *

"(c) POSITION OF NOTICE.—The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive."

The corresponding provision of the present Copyright Law is Section 10 which provides that:

"Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title."

The Court will note that new Sections 401(a) and (c) contain the plural word "copies" while old Section 10 contains the singular expression "each copy". A fair con-

struction of these respective Sections would probably lead to the conclusion that there is no substantial difference in meaning or intent as between "copies" and "each copy". Under the new Copyright Law, as under the present Copyright Law, when a copyrighted work is embodied in separate, discrete articles, each article requires its own copyright notice.

It is also noted that Section 401(c) provides for "reasonable notice". There is no corresponding provision in Section 10, but it is certainly a fair construction of Section 10 that it, too, would be satisfied by "reasonable notice".

In this connection, we note the introduction (by amendment in 1971) of the expression "reasonable notice" into Section 20 of the present Copyright Law:

"The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice." (Our emphasis)

It is true that the expression "reasonable notice" relates specifically only to sound recordings, but it is an indication that under the present Copyright Law, as under the new Copyright Law, "reasonable notice" is deemed sufficient statutory notice.

Neither the new Copyright Law nor the present Copyright Law defines "affixed" literally, that is, as a physical attachment of the copyright notice to the copyrighted work. On the contrary, both expressly sanction affixation of a copyright notice to a phonorecord container, e.g., a jacket or envelope into which a phonorecord is inserted with no mechanical means securing them together. See above-quoted Section 402(c) of the new Copyright Law which provides that the copyright notice may be placed on a phonorecord "container, in such manner and location as to give reasonable notice of the claim of copyright." By the Amendment of 1971, above-quoted Section 20 of the present Copyright Law contains a comparable provision. It is there provided that the copyright notice may be applied to a sound recording "container in such manner and location as to give reasonable notice of the claim of copyright." (Our emphasis in both quotations).

The language and the intent of both provisions are clearly identical, and it is evident, that, at least by the Amendment of 1971, the Congressional intent was to infuse the spirit and philosophy of the new Copyright Law (then the Copyright Revision Bill) into the present Copyright Law.

Although both Section 402(c) of the new Copyright Law and amended Section 20 of the present Copyright Law relate the use of containers specifically to phonorecords, it is a fair inference from these provisions that neither the new Copyright Law nor the present Copyright Law requires a physical attachment of the copyright notice to the copyrighted work.

In this connection, we respectfully call the Court's attention to the fact that the new Copyright Law was originally designated Title I of the Copyright Revision Bill. Title II, was included in the Copyright Revision Bill which was twice passed by the Senate, in September, 1974, by a vote of 70 to 1, and again in February, 1976, by a vote of 97 to 0. However, when the House passed the Copyright Revision Bill (on September 22, 1976, by a vote of 316 to 7), it "deleted Title II from the bill with the understanding that the subject would be considered in depth during the next Congress." (Statement by Congressman Robert W. Kastenmeir, Chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, Patent, Trademark & Copyright Journal for September 30, 1976, page D-3.)

Although Title II has not as yet been enacted into law, it is believed, under the authority of the Goodis case, supra, 425 F. 2d at p. 402, that Title II should be considered as "a valuable reference tool to be used in cases arising under the present Copyright Act." We, accordingly, call the provi-

sions of Section 206(b), Title II, to the attention of the Court:

"(b) The [design] notice shall be so located and applied as to give reasonable notice of design protection with the useful article embodying the design is passing through its normal channels of commerce. This requirement may be fulfilled, in the case of sheetlike or strip materials bearing repetitive or continuous designs, by application of the notice to each repetition, or to the margin, selvage, or reverse side of the material at reasonably frequent intervals, or to tags or labels affixed to the material at such intervals." (Our emphasis)

There is the same provision for "reasonable notice" in Section 206(b) of Title II as in above-quoted Section 402(c) of the new Copyright Law and amended Section 20 of the present Copyright Law. Additionally, Section 206(b) expressly provides that "in the case of sheetlike or strip materials bearing repetitive or continuous designs" (which are the very materials involved in the present case), the notice may be applied to tags and - this is very significant - the tags may be affixed to the material at reasonably frequent intervals.

There is no conflict or inconsistency between Section 206(b) of Title II (passed only by the Senate) and either the new Copyright Law or the present Copyright Law. Nor is there any conflict or inconsistency between Section 206(b) and H.M. Kolbe Co. v. Armigus Textile Company, 315 F. 2d 70, 73 (2 Cir. 1963) where this Court carefully limited its de-

cision to "Textiles normally sold by the bolt at whole-sale, in units of a yard at retail." Under both Kolbe and Section 206(b), fabric sold by the yard should have a notice affixed at intervals of a yard. As held in Kolbe (at p. 73):

"Kolbe affixed at least one statutory notice to each smallest commercial unit by which its product is normally sold. No other practicable arrangement of copyright notices would better have warned defendants below, or other potential infringers, of Kolbe's claim."

But there most definitely is a conflict between Section 206(b) and the decision of the Court below on plaintiff's motion for a preliminary injunction (which decision was apparently incorporated by reference into the decision following trial). The trial Court found (App. 65a) that:

"Belle apparently sold this fabric in entire rolls and did not cut the material for sale in smaller quantities. It did, however, distribute samples of the "Camelot" fabric, to which it stapled white cards bearing the stamped copyright notice."

This finding, coupled with Belle's undisputed statements under oath, at trial and on the motion (App. 205a, 410a), that its licensed fabric is sold only to furniture manufacturers, is a determination that a full roll of Belle's licensed fabric is (in the language of Kolbe) the "smallest commercial unit by which its product is normally sold." Such being the case, Section 206(b) would "make ... impossible" (Goodis, supra, 425 F. 2d at p. 402) the trial Court's finding (App. 60a) that "the single copyright notice affixed by Belle to the fifty-yard rolls it produced is insufficient to

protect Greeff's copyright."

We respectfully submit to this Court (as we did to the Court below) that a single notice, applied by Belle to the smallest commercial unit sold (a roll or bolt), sold only to the ultimate users thereof (furniture manufacturers), would satisfy Section 206(b) and should satisfy Section 10 of the present Copyright Law. A single notice affixed to a bolt of fabric, sold only by the bolt and only to the ultimate user, is affixed to each and every part of the fabric and to each and every repeat of the copyrighted design and clearly satisfies the requirement of Section 10 that the "notice shall be affixed to each copy" of the copyrighted work.

Forfeiture Under the
New Copyright Law

Sections 405(a) and (b) of the new Copyright Law provide as follows:

"(a) EFFECT OF OMISSION ON COPYRIGHT.—
The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if —

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phono-

records that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

"(b) EFFECT OF OMISSION ON INNOCENT INFRINGERS.—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court."

The corresponding provisions of the present Copyright Act are set forth in Section 21 which provides as follows:

"§21. Same; effect of accidental omission from copy or copies

Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of the prescribed notice from a parti-

cular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct."

Section 405(a)(1) of new Copyright Law

This Section provides that a copyright is not invalidated where the notice has been omitted from "a relatively small number of copies distributed to the public". In the present case, neither plaintiff nor Belle, as licensee, has "omitted" the notice from any copies. Belle's allegedly insufficient notice has been applied to "a relatively small number of copies" if the count is by bolt, the smallest commercial unit sold. Belle sold, all told, including the yardage with a copyright notice at every repeat, 55,000 yards of licensed goods (App. 175a). There being approximately 50 yards in each bolt (App. 337a, 404a) this would mean a total sale of some 1,100 bolts.

If the count is by repeat of the copyrighted design, we would not contend that only "a relatively small number of copies were sold".

Section 405(a)(2) of new Copyright Law

This Section provides that omission of the prescribed copyright notice does not invalidate a copyright if "registration for the work has been made before publication without notice, and a reasonable effort is made to add notice to all copies that are distributed after the omission has been discovered". In the present case, registration of plaintiff's copyright was made on September 13, 1974 (see Plaintiff's Exhibit 1, App 378a), long before Belle's publication with its allegedly insufficient copyright notice (Belle became plaintiff's licensee on October 20, 1975, App 387a). Additionally, promptly upon the trial Court's finding of insufficiency of Belle's notice plaintiff made certain that Belle complied with the notice requirements of the Court. This appears from the testimony of Belle's president (App.184a), his affidavit of April 23, 1976 (Defendant's Exhibit J, App. 395a), the second license agreement (Defendant's Exhibit D, App. 390a) and Plaintiff's Exhibit 11, which is a specimen of Belle's fabric having a separate copyright design. We respectfully call the Court's attention to the following provision of the second license agreement (Defendant's Exhibit D):

"This notice shall be applied to each repeat of the pattern."

This agreement was signed on April 23, 1976, just ten days after the Court below denied plaintiff's motion for a preliminary injunction on the ground of insufficiency of Belle's copyright notice.(App. 391a)

It is true that defendant called the alleged insufficiency of Belle's notice to plaintiff's attention prior to the March 19, 1976 hearing on the motion for a preliminary injunction and that plaintiff waited until the Court ruled on the motion before requiring a change in Belle's notice. But, for the reasons set forth in this Brief, plaintiff considered Belle's notice to be sufficient, and it can fairly be said that, in the sense of Section 405(a)(2), it was not until the trial Court ruled to the contrary, that plaintiff "discovered" the omission (insufficiency).

Section 405(a)(3) of new Copyright Law

This Section provides that a copyright is not invalidated where the notice is omitted "in violation of an express requirement in writing" that the authorized copies "bear the prescribed notice". That is precisely the situation in the present case, where the license agreement of October 20, 1975, expressly provided (App. 388a) that:

"4. Belle agrees to place the following copyright notice on all of the "CAMELOT" fabric or reproductions thereof sold or displayed in any form:

"Fabric design licensed and copyright ©
by Greeff Fabrics, Inc."

" * * * Belle covenants and agrees to
sell the fabric licensed hereby in strict
conformity with all laws, rules and regulations."

This provision is far stronger and more explicit than the corresponding provision which the Eastern District expressly approved in the Judscott case, supra, 377 F.S. at pp. 1375, 1378:

" . . . Imperial bound itself to put a "Dover" copyright notice "on all products sold by it bearing the MIRAGE design."

* * *

"An abandonment of a copyright requires some overt act by the copyright owner "which manifests his purpose to surrender his rights in the 'work,' and to allow the public to copy it." A licensing agreement containing an express provision of the type evidenced here can hardly be said to be such an act; "to the contrary, it indicates a positive and continuing purpose to maintain one's rights."

The precise meaning and intent of this provision were clearly understood by Belle's attorney Norman Popper (App. 239a,245a):

A [MR. POPPER]...The agreement specifically says that there is a certain form of copyright notice, and that copyright notice is to be applied to the fabric. It doesn't say to a tag but to the fabric, or reproduction[s] of the copyrighted design.

* * *

Q [MR. GOLDBERG] And did you understand, then, that it was Belle's obligation to comply with the statutory copyright notice requirements under the license?

A Yes. I believe I understood that.

Q Did you advise your client, Belle, what those statutory requirements were?

A No. I didn't. I advised him what the agreement provided.

Q And you told him to live up to the agreement?

A Yes.

It is plain, that under the new Copyright Law, the "express requirement in writing" for a "copyright notice on all of the CAMELOT fabric or reproductions thereof sold or displayed in any form" would make the trial Court's finding of forfeiture in the present case impossible. This finding would also be impossible under the present Copyright Law when interpreted in accordance with the Judscott decision, supra.

Section 405(b) of new Copyright Law

This Section deals only with "innocent infringers", that is, "Any person who innocently infringes a copyright, in reliance upon an authorized copy from which the copyright notice has been omitted". Such person incurs no liability for an infringing act committed "before receiving actual notice", provided that he "proves that he was misled by the omission of the notice".

This Section does not protect an infringer who did not rely upon an authorized copy from which the copyright notice had been omitted and who was not misled by such omission.

That, however, is the case here. By defendant's own admission, defendant did not obtain a specimen of Belle's authorized goods (Defendant's Exhibit F) with its allegedly insufficient copyright notice until after this action was instituted (App. 272a) and defendant makes no pretense of having relied on or been misled by this specimen or any other goods authorized by plaintiff. Defendant may have relied on the first two Belle samples (which bore no copyright notice of any kind) but there is no showing, and there can be no showing, that these samples were made or sold by Belle after Belle became plaintiff's licensee (App. 299a-300a).

Moreover, defendant received "actual notice" of plaintiff's copyright when the action was instituted and the complaint was served, but defendant has, nevertheless, continued to sell its infringing goods (App. 319a).

Clearly, indisputably, Section 405(b) of the new Copyright Law does not protect defendant in this case.

POINT IX

PLAINTIFF ESTABLISHED A PRIMA FACIE CASE UNDER SECTION 43(a) OF THE LANHAM ACT AND THE DISTRICT COURT ERRED IN DISMISSING IT FOR LACK OF EVIDENCE OF INJURY.

Statute Supporting Plaintiff's Claim

Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a), provides as follows:

"§ 1125. False designations of origin and false descriptions forbidden

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

Statement of Plaintiff's Claim (App. 7a)

"17. On information and belief, defendant has affixed or applied, or has caused to be affixed or applied, to its accused goods, the following description or representation, to wit: "Malden (C) Strike-off", and has caused such goods to enter into commerce in competition and in unfair competition, with plaintiff's copyrighted goods embodying the same pattern and bearing plaintiff's copyright notice.

"18. Such description or representation constitutes a claim of originality, exclusivity and copyrightability, all of which are false and

conflict with plaintiff's claim of originality, exclusivity and copyrightability for the same pattern.

"19. Defendant, having appropriated plaintiff's work of art, by its false description or representation seeks to appropriate unto itself copyright therein, and plaintiff believes and avers that it is or is likely to be damaged by the use of such false description or representation.

"20. Such false description or representation constitutes a palming-off of plaintiff's original, exclusive and copyrighted work of art as and for the original, exclusive and copyrighted work of art of the defendant, in competition with plaintiff, all to plaintiff's great and irreparable damage and injury."

Stipulation As to Plaintiff's Rights (App. 80c)

MR. GOLDBERG: Your Honor, we are willing to stipulate that as of October 20, 1976, approximately plaintiff Greeff Fabric was the proprietor of a copyright, a valid and subsisting copyright, of a design which constitutes the subject of the lawsuit.

Stipulation As to Defendant's Conduct (App. 83a)

MR. GOLDBERG: * * *
As of March 19, 1976, the date of the hearing motions in this court for a preliminary injunction, the plaintiff had in its upholstery line some 175 designs. On those strike-offs there appeared a copyright symbol, although Malden didn't claim copyright. * * *

Admission Concerning Defendant's Use of Strike-off Sample (App. 13a)

It is admitted in the Answer to Amended Complaint, Paragraph 6, that "strike-offs are never sold or used in any manner except as samples for solicitation of orders."

Defendant's Sample in Evidence

Plaintiff's Exhibit 4 is a strike-off sample of defendant's accused fabric embodying a copy of plaintiff's copyrighted design and imprinted with defendant's false copyright notice. Defendant's stipulation concerning this Exhibit is the following (App. 92a):

MR. GOLDBERG: * * * defendant is again prepared to stipulate that the accused fabric, Plaintiff's Exhibit 4, was made by the defendant by copying from a copy of the plaintiff's fabric.

For the convenience of the Court and for ready reference, a photocopy of a portion of Plaintiff's Exhibit 4, mainly of the back of the fabric, is hereto annexed as a part of this brief. The sample is approximately 18 inches square, it embodies less than one repeat of the design, and it contains some 27 copyright notices (MALDEN ©) printed in bold letters half-an-inch high, each notice almost four inches long.

Plaintiff's Case Under Section 43(a)
and the Court's Ruling Thereon

Plaintiff's prima facie case established the nature and reputation of its business, its use of copyrights to protect its designs, and the success of its copyrighted design in suit (App. 97a-104a). With regard to defendant's infringing fabric bearing a false copyright notice (Plaintiff's Exhibit 4) plaintiff's president Richard C. Johann testified as follows (App. 105a):

Q [MR. ROBERT STOLL] What, in your opinion, is the impact of this accused fabric [Plaintiff's Exhibit 4] on the market on the plaintiff Greeff?

A [MR. JOHANN] I think it is that effect on our reputation --

The answer was interrupted by counsel for defendant and a colloquy ensued, following which the Court ruled on the sufficiency of plaintiff's prima facie case as follows (App. 105a):

THE COURT * * * I think we will get into all of this if we get a recovery in this case. We will have to go into this in detail later on.

It seems to me you have established sufficient for the purpose of legally allowing damages in this case.

MR. STOLL: Would that be so with respect to the second cause of action?

THE COURT: I think so.

Evidently the Court had a change of mind on the sufficiency of plaintiff's prima facie case, as appears from the following excerpts from the trial testimony (App. 106a, 109a):

Q [By Robert Stoll on direct examination of Richard Johann, plaintiff's president] Has the use of a copyright notice, symbol "C" in the circle, on the defendant's copy of Greeff's design, had any affect upon the reputation of Greeff?

THE COURT: Well, it would seem to me you would have to lay a foundation before you could ask that question, because in order for him to answer that question it would seem to me he would have to know how many people saw this with the strike-off on it and under what circumstances did they see it and was it reported back to him.

Now, unless you lay a foundation for that, his testimony is pure conjecture, as he puts it. I can imagine it might have had some effect. I can imagine anything, but the question is, has he a sufficient basis for that on which to form an opinion?

* * *

MR. ROBERT STOLL: Your Honor, I believe it is within the competency of this witness to state the impact upon Greeff, to his own knowledge.

THE COURT: Yes, but what is his knowledge? That is the point. Unless you lay a foundation which shows that people have seen this and reported to him and it affected his sales, it would seem to me everything else is speculation on his part, and I don't think it would be allowable.

If you lay a foundation, fine and good.

This fellow in North Carolina said, "Look, I saw a strike-off of this and it is terrible material. It is affecting our business here. People think they are getting Greeff and they are getting something else"--you can argue it from the facts that have been developed so far, but that would be legal argument. It wouldn't be factual argument.

Plaintiff's president did not "know how many people saw this with the strike-off on it and under what circumstances did they see it" and none of this was "reported back to him" He was unable to testify "that people have seen this and reported to him and it affected his sales".

The Court's Decision

The Court's ruling on the Section 43(a) cause of action, at the close of plaintiff's case, is quoted from the trial transcript as follows (App. 254a):

MR. ROBERT STOLL: As far as damages are concerned, 43(a) doesn't require a showing of damage. The language of the section itself [it] says "...by any person who believes that he is or is likely to be damaged."

THE COURT: Well, I don't find that there is evidence to show that. There is purely a legal question, as far as I am concerned, and I grant the motion with an exception to the defendant [plaintiff].

The Court's decision of August 11, 1976, refers back to the above-quoted colloquy and holds as follows (App. 437a):

"As stated by the Court during the trial of this action, there is absolutely no evidence in the record of any injury to plaintiff due to the appearance of a copyright symbol next to the Malden name on the reverse side of Malden's strike-offs of the fabric design in question. Accordingly, the claim is dismissed."

The Trial Court Erred in Requiring Proof of Damage Resulting from Defendant's False Copyright Notice Per Se.

There is no way in the world plaintiff could have shown that defendant's false copyright notice per se caused the damage. Plaintiff does not object to defendant's use of its false copyright notice per se. Plaintiff does not object to defendant's use of its false copyright notice on 174 of the 175 designs in its upholstery fabric line. What plaintiff objects to is defendant's manufacture and sale of an infringing copy of plaintiff's copyrighted design and the affixation to samples of that infringing copy of a false copyright notice claiming the infringing copy as defendant's own copyrighted design. This is the complaint and it is self-evident, as Mr. Johann testified, that the impact of the accused fabric on the market is in its effect on plaintiff's reputation, not the false copyright notice alone, but the false copyright notice on an infringing copy of the copyrighted design in suit.

The burden of proof of which the trial Court imposed on the plaintiff in the present case is the very reverse of what it should have imposed. The burden should have been placed on the defendant to show that its application of a false copyright notice to samples of its infringing copy of plaintiff's copyrighted design, and its use of such samples in the solicitation of business, has not injured and is not likely to injure the plaintiff or plaintiff's customers, and has not deceived or misled and is not likely to deceive or mislead the public and, especially, the upholstered furniture manufacturing industry.

See the analogous case of Mishawaka Rubber & Woolen Mfg. Co. v. S..S. Kresge Co., 316 U.S. 203, 207, 62 S.Ct. 1022, 1025 (1942) where Mr. Justice Frankfurter wrote for the Supreme Court as follows:

"The starting point of the case before us is respondent's infringement of the petitioner's trademark in violation of the federal Act. The decree is assailed by the petitioner because, upon its reading of the decree, it is awarded only those profits which it can affirmatively prove to have resulted from sales "to purchasers who were induced to buy because they believed the heels to be those of plaintiff, and which sales plaintiff would otherwise have made."
* * * The decree in effect requires the petitioner to prove by a procession of witnesses that when they bought heels from the infringer they had a clear, well-focussed consciousness that they were buying the petitioner's heels and that otherwise they would not have bought them. But the shoe is on the other foot."

See, also:

Societe Comptoir De L'Industrie etc. v. Alexander's Department Store, 299 F.2d 33, 36 (2 Cir. 1962)

Ames Publishing Co. v. Walker-Davis Publications, 372 F.S. 1, 13 (D.C. Pa. 1974)

POINT X

THE TRIAL COURT ERRED IN FAILING
TO FIND THAT DEFENDANT'S USE
OF A FALSE COPY RIGHT NOTICE ON
ITS INFRINGING COPY OF PLAINTIFF'S
COPYRIGHTED DESIGN IS A PER SE VIO-
LATION OF SECTION 43a OF THE LANHAM
ACT

There is no doubt that defendant's affixation of its copyright notice to its copy of the design which is covered by plaintiff's copyright is a violation of the Copyright Law, regardless of whether defendant knew it to be plaintiff's copyrighted design, or believed it to be in the public domain, and, in either case, defendant has perpetrated a fraud on the public by claiming as its own copyrighted design, a design which it knew it did not create.

If defendant sincerely believed the design to be in the public domain when it initially obtained the one-yard specimen and then the 10-yard specimen, it violated 17 U.S.C. 8 when it put its copy of that design on the market under its own copyright notice. As Section 8 provides:

"No copyright shall subsist in the original text of any work which is in the public domain . . ."

On the other hand, if, as plaintiff contends, plaintiff's copyrighted design was not in the public domain when defendant obtained specimens thereof and copied same and put the copy on the market under its own copyright notice, defendant violated 17 U.S.C. 105 which provides, in part, that:

"Any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this title, or words of the same purport, in or upon any uncopyrighted article, * * * shall be guilty of a misdemeanor, punishable by a fine of not less than \$100 and

not more than \$1,000. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, * * * shall be liable to a fine of \$100.

In either case, whether plaintiff's design is in the public domain as defendant contends, or whether it is a copyrighted work as plaintiff contends, defendant's affixation of the copyright notice "MALDEN ©" to its copy of plaintiff's design violated Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a). See Kuddle Toy v. Pussycat Toy Co., 183 U.S.P.Q. 642, 665 (D.C.E.D. N.Y. 1974) and Channel Master Corp. v. JFD Electronics Corp., 260 F.S. 568, 574 (D.C. E.D. N.Y. 1967). Kuddle Toy involved the copyright symbol "©"; Channel Master involved the word "Patent".

The requirement for a detailed showing of deception and injury, impressed upon Section 43(a) by the trial court in the present case, does not accord with the most recent interpretation of that statute by this Court in Gilliam v. American Broadcasting Companies, -F.2d-, Docket Nos. 75-7693, 76-7023 (June 30, 1976). The following excerpt is taken from page 4568 of the slip opinion:

"This statute, the federal counterpart to state unfair competition laws, has been invoked to prevent mis representations that may injure plaintiff's business or personal reputation, even where no registered trademark is concerned. [citation] It is sufficient to violate the Act that a representation of a product, although technically true, creates a false impression of the product's origin." [Our emphasis]

That is the case, here, where defendant's false representation (its false copyright notice) creates a false impression of the design's origin.

CONCLUSION

It is respectfully urged that the decision of the District Court be reversed and that the District Court be directed to enter judgment in favor of plaintiff-appellant as to both causes of action in the amended complaint, and to award to plaintiff-appellant such damages as it may find together with the costs of the action and the appeal and, as to the copyright cause of action, a reasonable attorneys fee in both courts.

Respectfully submitted,

STOLL and STOLL
Attorneys for Plaintiff-Appellant

By



Samuel J. Stoll
Robert S. Stoll
Doris S. Hoffman

ADDENDUM

ADDENDUM: Lewkowitz Affidavit of May 5, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
GREEFF FABRICS, INC., :
 :
 Plaintiff, :
 : 76 Civ. 1188 (JMC)
 -against- :
 :
 MALDEN MILLS INDUSTRIES, INC., :
 :
 Defendant. :
-----x

AFFIDAVIT OF JEREMIAH LEWKOWICZ

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Jeremiah Lewkowicz, being duly sworn, deposes and says:

This affidavit is intended to supplement my affidavit of April 23, 1976 and to apprise the Court of developments in our effort to devise an acceptable method of affixing the Greeff copyright notice to our licensed Jacquard goods.

We have been unable to apply the copyright notice by rubber stamp either to the back of the goods or to the selvedge. No matter how we tried, we could not stamp the notice on the goods in legible form.

We have been trying to apply the copyright notice by means of adhesive labels attached to the goods. When the adhesive is strong enough to secure the labels to the goods,

removing the labels (to put the goods to use) results in pulling yarn ends out of the goods and thereby damaging the goods. When the adhesive is too weak to pull out the yarn ends, it is also too weak to secure the labels to the goods.

We have consulted with a number of packaging and label companies in connection with this problem since learning of the Court's decision and only today have I found a label manufactured by Monsanto, which may solve the problem. My order for such labels printed with the requisite copyright notice will not be received for about a week or 10 days and until then I will not know if the labels will be satisfactory.

The foregoing does not take into account two additional problems mentioned in my affidavit of April 23, 1976, namely:

- a) whether the Scotch Guard processors (Synthetic Finishing Corporation) will accept goods having labels securely attached at each repeat (70 repeats per bolt) of the pattern, and
- b) whether customers will accept such goods.

I again respectfully urge the Court to reconsider its decision that our method of affixing the copyright notice by means of a piece ticket is not sufficient under the Copyright Law.

In the meantime, and pending either a change in the Court's decision or the label method of affixing the copyright notice in accordance with the Court's original decision, we have not shipped our licensed goods. Our customers are irate and, in order to avoid further loss, and pending receipt of the Monsanto printed labels, I am having my employees hand stamp blank Monsanto labels, to be attached to the selvedge, one to each repeat, in the event there is no other acceptable method.

The Court's requirements are highly injurious to us and our customers. Ironically, our competitor, Malden, continues to sell its competing goods, paying no royalties to Greeff and totally unconcerned about the problem of copyright notice affixation.

This is obviously an unfair and inequitable situation and I hope that the Court will view our plight sympathetically.

Jeremiah Lewkowicz

Sworn to before me this
5th day of May, 1976

Notary Public

ADDENDUM: PORTION OF PLAINTIFF'S EXHIBIT 4

PLAINTIFF
EXHIBIT
U.S. DIST. COURT
S.D. OF N.Y.
JUL 13 1976

USA
(SD)

TWO (2)

— (3) BRIEF of Plaintiff - Appellant
in the case of 3RD DEPT. 1976

Georgie Goldberg

Deputy - Appellant